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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1940

No. 958

KETTLEMAN HILLS ROYALTY SYNDICATE No. 1 (a trust),

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

Petitioner pointed out in its brief in support of its petition for certiorari that the opinion in the court below was in reality based on two propositions, neither of which petitioner believed to be sound:

First. The mere receipt by the trustees of cash received by reason of ownership of property and its disbursement to beneficiaries (time honored trust func-

tions) *plus* the *unexercised* power to depart from such purely trust functions and go into activities of a business nature is the doing of business (Cf. pp. 15-16, Pet's. Brief) and

Second. Petitioner was doing business because it exercised its "business judgment" in modifying its royalty contracts in connection with the oil conservation program, even though such acts were protective in nature and with an absence of any profit-seeking motive (Cf. pp. 24-25, Pet's. Brief).

Petitioner cited cases under each proposition indicating that such holdings were in conflict with numerous decisions of other Circuit Courts of Appeals and of this court itself.

As the brief for the respondent in opposition makes answer to the first proposition, but is silent as to the second; and, as such brief admits a conflict among the various Circuit Courts of Appeals as to the first proposition and, it is respectfully submitted, enunciates an erroneous conception of the law in support thereof (hereinafter quoted), petitioner has deemed it advisable to file this brief reply addressed only to the first proposition.

Respondent's cited cases disclose, and respondent *admits,* a conflict in the decisions of the First, Eighth and Ninth Circuit Courts of Appeals and Court of Appeals for the District of Columbia on the one hand and the Sixth Circuit on the other hand as to whether,

> "* * * in ascertaining the existence of an association, the main question is the scope of the powers conferred upon the trustees by the inden-

ture, rather than the extent to which such powers were used" (Res. Brief, pp. 9-10).

The contrariety of judicial opinion presently prevailing in the various circuits on this proposition (not to mention earlier cases cited by respondent) may be observed by contrasting the opinion in *Sears v. Hassett,* 111 F. (2d) 961 (C.C.A. 1), with *Commissioner v. Gibbs-Preyer Trusts Nos. 1 and 2,* 117 F. (2d) 619 (C.C.A. 6), both cited by respondent at pages 9 and 10 of respondent's brief and admitted by respondent to be in conflict; or by contrasting *Sears v. Hassett,* supra, with *Cleveland Trust Co. v. Commissioner,* 115 F. (2d) 481 (C.C.A. 6), No. 764, present Term, certiorari denied March 17, 1941, and with *United States v. Davidson,* 115 F. (2d) 799 (C.C.A. 6).

Respondent contends that *Helvering v. Coleman-Gilbert,* 296 U. S. 369; *Wholesalers Adjustment Co. v. Commissioner,* 88 F. (2d) 156 (C.C.A. 8); *Sears v. Hassett,* 111 F. (2d) 961 (C.C.A. 1); *Fidelity-Bankers Trust Co. v. Helvering,* 113 F. (2d) 14 (App. D.C.), and *Commissioner v. Vandergrift R. & Inv. Co.,* 82 F. (2d) 387 (C.C.A. 9), establish the affirmative of the above-quoted proposition (Res. Brief, p. 9). Whereas petitioner contends that the following cases, among many others, establish the negative of such proposition: namely, *Commissioner v. Gibbs-Preyer Trusts Nos. 1 and 2* (C.C.A. 6), supra, *Cleveland Trust Co. v. Commissioner* (C.C.A. 6), supra, and *United States v. Davidson,* supra.

As there is presented in this case real conflicts with decisions of other Circuit Courts of Appeals, and as

the decision is certain to make for confusion and uncertainty in the administration of the revenue laws, it is respectfully submitted the petition for certiorari should be granted.

Dated, San Francisco, California,
May 21, 1941.

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MAURICE E. GIBSON,
Of Counsel.